

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA

Alexandria Division

UNITED STATES OF AMERICA)	
)	
v.)	CRIMINAL NO. 03-326-A
)	
MARK SHUMAKER,)	
)	
Defendant.)	

PLEA AGREEMENT

Paul J. McNulty, United States Attorney for the Eastern District of Virginia; Scott Stein, Assistant United States Attorney; Michael M. DuBose, Senior Counsel, Computer Crime and Intellectual Property Section, Department of Justice; and the defendant, Mark Shumaker, and the defendant's counsel, Zachary E. Stoumbos, Esq., Gregory Miller, Esq., pursuant to Rule 11(c) of the Federal Rules of Criminal Procedure, have entered into an agreement, the terms and conditions of which are as follows:

1. The defendant, Mark Shumaker, agrees to waive indictment and plead guilty to a one count criminal information filed with this agreement. Count one charges the defendant with criminal copyright infringement, in violation of federal criminal copyright laws, 17 U.S.C. §506(a)(1) and 18 U.S.C. §2319 (b)(1). The maximum penalty for this offense is a term of five years of imprisonment, a fine of \$250,000, full restitution, a special assessment, and three years of supervised release. The defendant is aware that this supervised release term is in addition to any prison term the defendant may receive, and that a violation of a term of supervised release could result in the defendant being returned to prison for the full term of supervised release.

2. Before sentencing in this case, the defendant agrees to pay a mandatory special assessment of one hundred dollars (\$100.00) per count of conviction.

3. The parties agree to recommend to the Court that the complication and prolongation of the sentencing process resulting from fashioning an order of restitution outweighs the need to provide restitution to any victims, pursuant to Title 18, Section 3663A(c)(3)(B).

4. The defendant is aware that the defendant's sentence will be imposed in accordance with the Sentencing Guidelines and Policy Statements. The defendant is aware that the Court has jurisdiction and authority to impose any sentence within the statutory maximum set for the offense(s) to which the defendant pleads guilty. The defendant is aware that the Court has not yet determined a sentence. The defendant is also aware that any estimate of the probable sentencing range under the sentencing guidelines that the defendant may have received from the defendant's counsel, the United States, or the probation office, is a prediction, not a promise, and is not binding on the United States, the probation office, or the Court. The United States makes no promise or representation concerning what sentence the defendant will receive, and the defendant cannot withdraw a guilty plea based upon the actual sentence. The defendant is aware that Title 18, United States Code, Section 3742 affords a defendant the right to appeal the sentence imposed. Acknowledging all this, the defendant knowingly waives the right to appeal any sentence within the maximum provided in the statute(s) of conviction (or the manner in which that sentence was determined) on the grounds set forth in Title 18, United States Code, Section 3742 or on any ground whatever, in exchange for the concessions

made by the United States in this plea agreement. This agreement does not affect the rights or obligations of the United States as set forth in Title 18, United States Code, Section 3742(b).

5. The Defendant and the government further agree, based on the evidence now known to the parties, to recommend to the Court that the infringement amount under the provisions of USSG §2B5.3.(b)(1) is more than \$40,000 but less than \$70,000; that the offense involved the uploading of infringing items; and that the offense was committed for commercial advantage or private financial gain. The parties understand these agreements on the Guidelines calculation are not binding upon the Court or U.S. Probation.

6. The United States will not further criminally prosecute defendant in the Eastern District of Virginia for the specific conduct described in the indictment, criminal information or statement of facts. Therefore, defendant does not have immunity for crimes related to, but not specifically set out in the indictment, criminal information or statement of facts.

7. The defendant represents to the Court that defendant is satisfied that defendant's attorney has rendered effective assistance. Defendant understands that by entering into this agreement, defendant surrenders certain rights as provided in this agreement. Defendant understands that the rights of criminal defendants include the following:

a. If the defendant persisted in a plea of not guilty to the charges, defendant would have the right to a speedy jury trial with the assistance of counsel. The

trial may be conducted by a judge sitting without a jury if the defendant, the United States, and the judge all agree.

b. If a jury trial is conducted, the jury would be composed of twelve laypersons selected at random. The defendant and defendant's attorney would assist in selecting the jurors by removing prospective jurors for cause where actual bias or other disqualification is shown, or by removing prospective jurors without cause by exercising peremptory challenges. The jury would have to agree unanimously before it could return a verdict of either guilty or not guilty. The jury would be instructed that the defendant is presumed innocent, that it could not convict the defendant unless, after hearing all the evidence, it was persuaded of the defendant's guilt beyond a reasonable doubt, and that it was to consider each charge separately.

c. If a trial is held by the judge without a jury, the judge would find the facts and, after hearing all the evidence and considering each count separately, determine whether or not the evidence established the defendant's guilt beyond a reasonable doubt.

d. At a trial, the United States would be required to present its witnesses and other evidence against the defendant. The defendant would be able to confront those witnesses and defendant's attorney would be able to cross-examine them. In turn, the defendant could present witnesses and other evidence in defendant's own behalf. If the witnesses for the defendant would not appear voluntarily, defendant could require their attendance through the subpoena power of the Court.

e. At a trial, the defendant could rely on a privilege against self-incrimination to decline to testify, and no inference of guilt could be drawn from the refusal

to testify. If the defendant desired to do so, the defendant could testify in the defendant's own behalf.

8. The defendant agrees to cooperate fully and truthfully with the United States, and provide all information known to the defendant regarding any criminal activity. In that regard:

a. The defendant agrees to testify truthfully and completely at any grand juries, trials or other proceedings.

b. The defendant agrees to be reasonably available for debriefing and pre-trial conferences as the United States may require.

c. The defendant agrees to provide all documents, records, writings, or materials of any kind in the defendant's possession or under the defendant's care, custody, or control relating directly or indirectly to all areas of inquiry and investigation.

d. The defendant agrees that, upon request by the United States, the defendant will voluntarily submit to polygraph examinations to be conducted by a polygraph examiner of the United States' choice. The defendant stipulates to the admissibility of the results of this polygraph examination if later offered in a proceeding to determine the defendant's compliance with this plea agreement.

e. The defendant agrees that the accompanying Statement of Facts is limited to information to support the plea. The defendant will provide more detailed facts relating to this case during ensuing debriefings.

f. The defendant is hereby on notice that the defendant may not violate any federal, state, or local criminal law while cooperating with the government, and that

the government will, in its discretion, consider any such violation in evaluating whether a downward departure is appropriate.

g. Nothing in this agreement places any obligation on the government to seek the defendant's cooperation or assistance.

9. a. The United States agrees not to use any truthful information provided pursuant to this agreement against the defendant in any other criminal prosecution against the defendant in the Eastern District of Virginia. Pursuant to Section 1B1.8 of the Sentencing Guidelines, no truthful information that the defendant provides pursuant to this agreement will be used to enhance the defendant's guidelines range. The United States will bring this plea agreement and the full extent of the defendant's cooperation to the attention of other prosecuting offices if requested.

b. Nothing in this plea agreement restricts the Court's or Probation Office's access to information and records in the possession of the United States. Further, nothing in this agreement prevents the government in any way from prosecuting the defendant should the defendant provide false, untruthful, or perjurious information or testimony. Moreover, nothing in this agreement prevents the government from using such information in furtherance of any forfeiture action, whether criminal or civil, administrative or judicial.

10. This plea agreement is not conditioned upon charges being brought against any other individual. This plea agreement is not conditioned upon any outcome in any pending investigation. This plea agreement is not conditioned upon any result in any future prosecution which may occur because of the defendant's cooperation. This plea

agreement is not conditioned upon any result in any future grand jury presentation or trial involving charges resulting from this investigation. This plea agreement is conditioned upon the defendant providing full, complete and truthful cooperation.

11. The parties agree that the United States reserves its option to seek any departure from the applicable sentencing guidelines, pursuant to Section 5K of the Sentencing Guidelines and Policy Statements, or Rule 35(b) of the Federal Rules of Criminal Procedure, if in its sole discretion, the United States determines that such a departure is appropriate. The parties agree that in cases where the United States does file such a motion, the United States reserves its option to file a further motion under 18 U.S.C. § 3553(e) to permit a departure under any applicable mandatory minimum sentence, if in its sole discretion the United States determines that such a further motion is appropriate.

12. The accompanying Statement of Facts signed by the defendant is hereby incorporated into this plea agreement. Defendant adopts the Statement of Facts and agrees that the facts therein are accurate in every respect and that had the matter proceeded to trial, the United States would have proved those facts beyond a reasonable doubt.

13. Defendant agrees that upon acceptance of this plea agreement by the Court, all infringing copies of copyrighted works and all implements, devices, or equipment -- including personal computers -- used to store or distribute such infringing copies, which were seized from his possession or control pursuant to federal warrant on December 11, 2001, shall immediately be subject to destruction, forfeiture, or other disposition, as

appropriate, consistent with the mandate of 17 U.S.C. § 506(b). Defendant further agrees to waive the provisions of Federal Rules of Criminal Procedure 7(c)(2), 32.2 and 43(a) and to sign any papers or agreements that may be necessary to accomplish this provision.

14. If the defendant fails in any way to fulfill completely all of the obligations under this plea agreement, the United States may seek release from any or all its obligations under this plea agreement.

15. If the defendant fails to fulfill the obligations under this plea agreement, the defendant shall assert no claim under the United States Constitution, any statute, Rule 410 of the Federal Rules of Evidence, Rule 11(f) of the Federal Rules of Criminal Procedure, or any other federal rule, that defendant's statements pursuant to this agreement or any leads derived therefrom, should be suppressed or are inadmissible.

16. Any alleged breach of this agreement by either party shall be determined by the Court in an appropriate proceeding at which the defendant's disclosures and documentary evidence shall be admissible and at which the moving party shall be required to establish a breach of the plea agreement by a preponderance of the evidence. The proceeding established by this paragraph does not apply, however, to the United States' decision whether to file a motion based on "substantial assistance" as that phrase is used in Rule 35(b) of the Federal Rules of Criminal Procedure and Section 5K1.1 of the Sentencing Guidelines and Policy Statements. The defendant agrees that the decision whether to file such a motion rests in the United States' sole discretion.

17. The defendant hereby waives all rights, whether asserted directly or by a representative, to request or receive from any department or agency of the United States

any records pertaining to the investigation or prosecution of this case, including without limitation any records that may be sought under the Freedom of Information Act, 5 U.S.C. § 552, or the Privacy Act, 5 U.S.C. § 552a.

18. This written agreement constitutes the complete plea agreement between the United States, the defendant, and the defendant's counsel. The United States has made no promises or representations except as set forth in writing in this plea agreement. The defendant acknowledges that no threats have been made against the defendant and that the defendant is pleading guilty freely and voluntarily because the defendant is guilty. Any modification of this plea agreement shall be valid only as set forth in writing in a supplemental or revised plea agreement signed by all parties.

19. Defendant's Signature: I hereby agree that I have consulted with my attorney and fully understand all rights with respect to the pending criminal indictment or criminal information. Further, I fully understand all rights with respect to the provisions of the Sentencing Guidelines and Policy Statements which may apply in my case. I have read this plea agreement and carefully reviewed every part of it with my attorney. I understand this agreement and I voluntarily agree to it.

Date: _____

Mark Shumaker
Defendant

20. Defense Counsel Signature: I am counsel for the defendant in this case. I have fully explained to the defendant the defendant's rights with respect to the pending indictment or criminal information. Further, I have reviewed the provisions of the Sentencing Guidelines and Policy Statements and I have fully explained to the defendant

the provisions of those Guidelines which may apply in this case. I have carefully reviewed every part of this plea agreement with the defendant. To my knowledge, the defendant's decision to enter into this agreement is an informed and voluntary one.

Date: _____

Zachary E. Stoumbos, Esq.
Counsel for Defendant

Brian Phillips, Esq.
Counsel for Defendant

Respectfully submitted,

Paul J. McNulty
United States Attorney

By:

Scott Stein
Assistant United States Attorney

By:

Michael M. DuBose
Senior Counsel
Computer Crime and Intellectual
Property Section
U.S. Department of Justice

APPROVED:

Date: _____

U. S. DEPARTMENT OF JUSTICE
Statement of Special Assessment Account

This statement reflects your special assessment only. There may be other penalties imposed at sentencing.

ACCOUNT INFORMATION	
CRIM. ACTION NO.:	03-326-A
DEFENDANT'S NAME:	Mark Shumaker
PAY THIS AMOUNT:	\$100.00

INSTRUCTIONS:

- 1. MAKE CHECK OR MONEY ORDER PAYABLE TO:**
CLERK, U.S. DISTRICT COURT
- 2. PAYMENT MUST REACH THE CLERK'S OFFICE BEFORE YOUR SENTENCING DATE**
- 3. PAYMENT SHOULD BE SENT TO:**

	In person (9 AM to 4 PM)	By mail:
Alexandria cases:	Clerk, U.S. District Court 401 Courthouse Square Alexandria, VA 22314	
Richmond cases:	Clerk, U.S. District Court 1000 E. Main Street, #307 Richmond, VA 23219	
Newport News cases:	Clerk, U.S. District Court 101 - 25 th Street, 2 nd Floor Newport News, VA 23607	Clerk, U.S. District Court P. O. Box 494 Newport News, VA 23607
Norfolk cases:	Clerk, U.S. District Court 600 Granby Street Norfolk, VA 23510	

- 4. INCLUDE DEFENDANT'S NAME ON CHECK OR MONEY ORDER**
- 5. ENCLOSE THIS COUPON TO INSURE PROPER and PROMPT APPLICATION OF PAYMENT**

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UNITED STATES OF AMERICA)	
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v.)	CRIMINAL NO. 03-326-A
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MARK SHUMAKER)	

WAIVER OF INDICTMENT

I, Mark Shumaker, the above named defendant, accused of criminal copyright infringement, in violation of federal criminal copyright laws, 17 U.S.C. §506(a)(1) and 18 U.S.C. §2319 (b)(1), being advised of the nature of the charge, the proposed information, and of my rights, hereby waive in open court prosecution by indictment and consent that the proceeding may be by information rather than by indictment.

Date: _____

Defendant

Counsel for Defendant

Before: _____

UNITED STATES DISTRICT JUDGE